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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Curtis Bridgeman,

9 Plaintiff,

10 vs.

11 CitiMortgage Inc., et al.,

12 Defendants.

13 No. CV11-1106-PHX DGC

14 **ORDER**

15 All defendants except Provident Funding Associates LP move to dismiss. Doc. 8,
16 The Court will refer to moving defendants as Defendants or Moving Defendants for
17 purposes of this order. Plaintiff opposes through counsel (Doc. 11), and Defendants have
18 filed a reply (Doc. 13). The Court will grant the motion as stated below.

19 **I. Background.**

20 This civil action challenging foreclosure, filed by Plaintiff in Arizona Superior
21 Court for Maricopa County (Doc. 1-2), was removed to this Court by Defendants on
22 grounds of diversity jurisdiction (Doc. 1 at 3). Although Defendant Shelley Boek is a
23 resident of Arizona, Defendants assert that she was fraudulently joined. *Id.* at 4-6.
24 Defendant Provident Funding Associates LP did not join in the removal, but Plaintiff did
25 not seek remand on this ground.

26 The complaint pleads ten counts: (1) declaratory judgment; (2) injunctive relief;
27 (3) breach of the covenant of good faith and fair dealing, alleged against Defendants

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1 CitiMortgage, CitiGroup, and MERS; (4) breach of contract, alleged against Defendant
2 CitiMortgage and an unnamed trustee; (5) breach of contract, violation of statute, and
3 lack of agency authority, alleged against all defendants; (6) breach of contract and lack of
4 authority, alleged against MERS; (7) breach of contract, alleged against all defendants;
5 (8) wrongful foreclosure, alleged against MERS, CitiMortgage, and an unnamed trustee;
6 (9) challenge to A.R.S. § 33-811(B) as violating the Arizona Constitution's separation of
7 powers doctrine, alleged against all defendants; and (10) breach of contract, alleged
8 against all defendants. Doc. 1-2.

9 **II. Discussion.**

10 **A. Summary of Defendants' Arguments.**

11 Defendants move to dismiss on several grounds, some overarching and some
12 specific. Defendants argue that the complaint violates Rule 8's fair notice requirement
13 because it is disorganized, and also argue that all claims are barred by A.R.S. § 33-
14 811(C). Doc. 8 at 4-6. Defendants further assert that all claims must be dismissed
15 because: (1) Defendants are not required to present the note before they may proceed
16 with a trustee sale; (2) securitization was permitted by the deed of trust and, in any case,
17 does not affect Plaintiff's obligations; (3) MERS is a valid beneficiary under the deed of
18 trust; and (4) the consent order alleged in Count 3 does not create a private right of
19 action. *Id.* at 7-11. In the alternative, Defendants argue that the claims against Citigroup
20 and MERSCORP should be dismissed because parent companies are not liable for
21 subsidiaries' acts absent involvement, and that Shelley Boek must be dismissed as a party
22 because no facts were alleged showing Boek is personally liable under an alleged cause
23 of action. *Id.* at 11-12.

24 Defendants further assert that specific counts fail because: (1) Count 3 has not
25 alleged Plaintiff was deprived of a benefit flowing from the note and deed of trust;
26 (2) Counts 4, 5, 6, 7 and 10 fail because no breach has been alleged, no damages have
27 been alleged, and the foreclosure sale has not yet occurred; (3) Count 5 fails because

1 MERS assigned its rights as beneficiary to CitiMortgage, CitiMortgage was the only
2 beneficiary, and CitiMortgage signed the substitution of trustee; (4) Counts 8 and 9 are
3 not ripe because the foreclosure sale has not yet occurred; and (5) Counts 1 and 2 fail
4 because Plaintiff lacks standing to obtain equitable remedies of declaratory and injunctive
5 relief, and declaratory relief is not proper where the complaint fails to state a claim. *Id.* at
6 13-17.

7 **B. Plaintiff's Arguments, and Discussion.**

8 **1. Preliminary Matters.**

9 Plaintiff responds seeking leave to amend, but does not attach a copy of the
10 proposed amended complaint as required by Local Rule 15.1. Leave to amend will
11 therefore be denied without prejudice, and Plaintiff may file a proper motion for leave to
12 amend in due course. The Court will rule on such motion once it has been fully briefed.

13 Plaintiff fails to address the argument that Shelley Boek was fraudulently joined to
14 avoid federal diversity jurisdiction. The Court will therefore dismiss the claims against
15 Ms. Boek without prejudice and retain diversity jurisdiction.

16 **2. *In re Veal.***

17 Plaintiff asserts as a general matter that *In re Veal*, 450 B.R. 897 (9th Cir. BAP
18 2011), recently held that the Uniform Commercial Code (“UCC”) applies to non-judicial
19 foreclosures, that the deed of trust follows the note, and that the right to enforce the note
20 is critical to foreclosure. Doc. 11 at 2-3. Plaintiff reads *Veal* out of context. *Veal*
21 concerned the issues of standing to assert proofs of claim in a bankruptcy proceeding and
22 standing to seek leave from a bankruptcy stay. 450 B.R. at 902. The burden in each
23 case was on the creditor and movant, respectively, and the court held the burden was not
24 met. *Id.* at 922. The court assumed without deciding, as a result of assumptions made by
25 the parties, that the UCC governed the note at issue. *Id.* at 908-09 (“Here, the parties
26 assume that the Uniform Commercial Code (‘UCC’) applies to the note.”). Moreover,
27 although Arizona law governed the analysis of real parties in interest as to the note, *id.* at
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1 920-21, Illinois law governed the analysis on mortgage enforcement, *id.* at 916. (The real
2 property at issue in *Veal* was located in Illinois. 450 B.R. at 902.).

3 By contrast, this case involves non-judicial foreclosure of property under the
4 power-of-sale clause in a deed of trust governed by Arizona law. Plaintiff fails to explain
5 why this Court should consider Illinois law when adjudicating rights under an Arizona
6 deed of trust, or why *Veal* is controlling in this case. Because *Veal* is materially
7 distinguishable, the Court concludes that it does not control. Plaintiff's response
8 regarding the enforceability of the note as related to foreclosure (Doc. 11 at 3-7, 11-12) is
9 equally inapposite because he has not shown foreclosure was attempted or made here
10 pursuant to the note rather than the deed of trust. Although the security is incident to the
11 debt under Arizona law, Plaintiff conflates the concepts of "note" and "debt," which are
12 distinct under Arizona law. *Silving v. Wells Fargo Bank, NA*, ___ F. Supp. 2d ___, 2011
13 WL 2669246, *9 (D. Ariz. July 7, 2011).

14 **3. Remaining Matters.**

15 Plaintiff also argues that CitiMortgage cannot foreclose on the deed of trust
16 because it does not appear in the chain of title and the original lender did not record the
17 substitution of trustee. Doc. 11 at 8-11. Plaintiff fails to persuasively address
18 Defendants' argument regarding MERS's ability to assign the original lender's interest to
19 CitiMortgage (*e.g.*, Doc. 8 at 9-10), and Plaintiff's citations to non-Arizona law are
20 unavailing (Doc. 11 at 13-14).

21 Plaintiff fails to address the other arguments made by Defendants. Although the
22 Court does not conclude that all of Defendants' arguments are sound law, Plaintiff
23 waived opposition for purposes of this motion on arguments to which responses were not
24 given.

25 **III. Conclusion.**

26 For the reasons above, the claims against Moving Defendants shall be dismissed
27 without prejudice. The motion for attorney fees is denied because Defendants have not
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1 yet shown they are the successful parties in the contract claims, and have not argued why
2 the Court should exercise its discretion to award fees under A.R.S. § 12-341.01.

3 **IT IS ORDERED:**

- 4 1. The motion to dismiss (Doc. 8) is **granted** as stated above.
5 2. The motion for attorney fees (Doc. 8) is **denied**.

6 Dated this 1st day of September, 2011.

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8 *David G. Campbell*
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10 David G. Campbell
11 United States District Judge
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